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In the Supreme Court of the United States

OCTOBER TERM, 1975

DONALD L. WASHUM, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. App. A) dismissing two related actions to set aside orders of the Interstate Commerce Commission (J.S. Apps. B and C). The Commission's orders denied the application of

appellant Svensson Freight Lines for a certificate of public convenience and necessity and that of appellant Donald L. Washum, owner of Svensson, for authority under Section 5 of the Interstate Commerce Act, 49 U.S.C. 5, to control Los Angeles-Yuma Freight Lines.[1]

Under Section 206(a)(7) of the Interstate Commerce Act, 49 U.S.C. 306(a)(7), the Commission may issue, to certain intrastate motor carriers who were, as of October 1962, lawfully engaged in interstate commerce under a prior exemption from normal certification requirements, a certificate of registration authorizing them to continue to engage in such interstate transportation. A certificate of registration may be issued, however, only if the carrier is not controlled by, does not control, and is not under common control with a carrier operating in another state, and the certificate is valid only so long as that condition remains satisfied.

In June 1964, the Commission issued a certificate of registration to appellant Svensson Freight Lines under Section 206(a)(7) (J.S. App. 3b). Two years later, several competing motor carriers filed a complaint with the Commission alleging that Svensson was affiliated with Los Angeles-Yuma Freight Lines, a multi-state carrier (*ibid.*). After hearings, the Commission found that the two carriers had been under common control since 1957 (*id.* at 3b-4b). It accordingly ruled that the certificate of registration

[1] Los Angeles-Yuma Freight Lines is the business name of appellant Haywood L. Washum, who is Donald Washum's father (J.S. App. 2a-3a.)

issued in 1964 "was improvidently issued * * * and has been invalid since that date" (*id.* at 3e), and it ordered Svensson to cease and desist from engaging in interstate commerce (*ibid.*).[2]

A three-judge district court thereafter dismissed a complaint seeking review of the Commission's order (299 F. Supp. 712; J.S. App. D), and this Court summarily affirmed on October 27, 1969 (396 U.S. 18).

2. While the first appeal was pending before this Court, Svensson filed a renewed application for a certificate of convenience and necessity and an application for temporary authority to continue its operations pending determination of the application for permanent authority. The Commission granted the temporary authority, but, after hearings, denied the application for a certificate of convenience and necessity on the grounds that Svensson was unfit and that the evidence failed to establish that the proposed operations were required by the public convenience and necessity (J.S. App. B).

The Commission found that, after this Court's affirmance of the prior cease and desist order in October 1969, "Svensson continued operations until January 15, 1970, without authority * * * despite the advice of counsel * * * in willful and flagrant vio-

[2] At the same time, the Commission denied Svensson's applications for authority to control Los Angeles-Yuma and for a certificate of convenience and necessity authorizing it to continue the interstate transportation it had performed under the certificate of registration (J.S. App. 3e).

lation of the orders of this Commission and the courts" (*id.* at 5b); that the "past willful misconduct does not stand as an isolated incident but fits into a larger and continuing pattern of violations of regulatory requirements that have occurred over a number of years and in the face of court orders" (*id.* at 8b); and that "[t]here is nothing on this record to suggest that this flagrantly unlawful type of conduct will not occur, if not continue, in the future" (*ibid.*).

The Commission did not view the past willful misconduct as "a per se bar to a grant" (*id.* at 7b), but rather considered it "as an 'element in assessing' [the applicants'] 'present and prospective fitness'" (*id.* at 8b). It stated (*ibid.*; emphasis in original):

> Under certain limited circumstances, we conceivably could grant an application, despite a record of willful misconduct, where an *overriding* public need has been demonstrated for a proposed service. This would involve a finding that our denial of an application would be tantamount to punishing the public by cutting off such a service. However, such a finding cannot be made in the case under review.

The Commission thereafter denied a petition for reconsideration (J.S. App. C) and a petition for rehearing (see J.S. App. 2a).

3. Appellants filed complaints seeking review of the Commission's orders, and the three-judge district court dismissed the actions (J.S. App. A). The court held that appellants' collateral attack upon the Commission's 1968 order invalidating the improvidently issued certificate of registration was barred by *res judicata* (J.S. App. 4a-5a), that the Commission's findings concerning Svensson's fitness were supported by substantial evidence (*id.* at 5a), and that the Commission adequately considered evidence concerning Svensson's operations under its temporary authority (*id.* at 6a).

ARGUMENT

The decision of the district court is correct, and the appeal presents no issue warranting plenary review.

1. Appellants' principal contention (J.S. 6-10) is that the Commission's 1968 order was improperly issued because the Commission failed to comply with Section 212(a) of the Act, 49 U.S.C. 312(a), which provides that a certificate may be revoked "for willful failure to comply" with applicable laws or regulations. The argument appears to be that, since the Commission's 1968 order was improper, the Commission could not properly take into account in the present proceedings Svensson's flagrant and willful violation of that order.

As the district court correctly held, however, this collateral attack on the 1968 order (which was upheld by a three-judge district court and by this Court on appeal) is barred by the doctrine of *res judicata*. Although appellants assert that they did not make their present contention in the prior administrative and judicial proceedings and therefore that the doc-

trine of collateral estoppel does not foreclose the present litigation, that contention rests on the erroneous premise that the present attack on the Commission's 1968 order is a "different cause of action" (J.S. 12; emphasis omitted) and therefore that the merger and bar effects of *res judicata* are inapplicable.

The fact is that the "causes of action," though perhaps different in form, are identical in substance. Both attack the validity of the same Commission order. It is settled that "a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end" (*Grubb* v. *Public Utilities Commission*, 281 U.S. 470, 479). As in *Grubb*, "[t]he thing presented for adjudication in the [prior proceeding] * * * was the validity of the [administrative] order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge"; appellants were "not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that" (*id.* at 478-479).

It follows that the Commission's 1968 order, whether proper or improper, is not subject to attack "in this collateral proceeding"; "[a] direct attack in

such circumstances was the remedy" (*Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 512).[3]

Even if appellants could properly challenge the Commission's 1968 order in the present proceeding and could establish the order's invalidity, that would not bear upon the validity of the 1972 order denying the application for a certificate of convenience and necessity. A determination now that the 1968 order was improperly issued would not excuse Svensson's flagrant violation of that order at a time when its validity had been sustained by the district court and by this Court on appeal, and it would not eliminate that misconduct as a consideration relevant to Svensson's fitness.[4]

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[3] It is no answer to say, as appellants assert (J.S. 13-15), that the Commission was without "jurisdiction" to issue its 1968 order. It is the judgment of the district court, affirmed by this Court, that bars relitigation, and appellants do not claim that the district court lacked subject matter jurisdiction to review the Commission's order. See *Walker* v. *City of Birmingham*, 388 U.S. 307.

[4] In any event, the 1968 order was properly issued. The order did not revoke a certificate within the meaning of Section 212(a) but rather declared void *ab initio* a certificate unlawfully issued. A "grandfather" certificate of registration under Section 206(a)(7)(A) could lawfully be issued, with exceptions not relevant here, only to an intrastate carrier which was "lawfully engaged in [interstate] operations * * * under the certificate exemption provisions * * * in effect immediately before October 15, 1962," and which was not under common control with any carrier operating in a different state. Since the Commission found that Svensson in

2. Appellants contend (J.S. 17-19) that the Commission, in the 1972 proceeding, erroneously refused to consider Svensson's temporary authority operations as "evidence to prove that public convenience and necessity require the carrier's services" (J.S. 17). As the district court correctly concluded, however, "[i]t is questionable that the temporary operations were material at the time the 1972 decision was rendered, and when that decision was amended [on petition for reconsideration] by Corrected Commission Order served May 8, 1974, the Commission stated [J.S. App. 2c] * * * that the newly submitted traffic report did not alter the original 1972 holding" (J.S. App. 6a).

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fact was *not* lawfully engaged in such interstate operations as of October 1962 and *was* under common control with an interstate carrier, it properly ruled that the certificate was void and there was no need to find a willful failure to comply with the law. Cf. *American Trucking Associations* v. *Frisco Transportation Co.*, 358 U.S. 133, 144-146.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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